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Supreme Court of the United States

October Term, 1974
No. 73-1689

UNITED STATES OF AMERICA,

Appellant,

vs.

AMERICAN BUILDING MAINTENANCE INDUSTRIES,

Appellee.

On Appeal From the United States District Court for the Central District of California.

Brief for American Building Maintenance Industries.

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On Appeal From the United States District Court for the Central District of California.

Brief for American Building Maintenance Industries.

QUESTION RESTATED.

May a corporation engaged in rendering janitorial services solely within a single state, using for that purpose labor obtained in that state and supplies purchased in that state, be deemed "engaged also in commerce" within that clause of Section 7 of the Clayton Act?

PRELIMINARY STATEMENT.

Relying upon Section 7 of the Clayton Act, the complaint sought to invoke the remedies available under Section 15 of the Clayton Act against the acquisition by appellee of the stock of J. E. Benton Management Corporation and Benton Maintenance Company (together referred to in the complaint and herein as "Benton").

While the complaint did not allege that Benton was "engaged also in commerce" within the requirement of Section 7, that issue was raised by the motion for summary judgment and is the issue before this Court.

This appeal is from a summary judgment rendered on the basis of findings of fact and conclusions of law (App. 209-215). As stated by appellant in the Court below, its opposition consisted of "a total of 28 affidavits to establish that, in terms of commercial reality, Benton was engaged in interstate commerce" (App. 192).

Appellant makes no objection here to the District Court's use of summary judgment procedure, nor to the form of the judgment. Appellant does not suggest that it was in any way foreclosed from presenting all available evidence concerning the interstate commerce issues. On the contrary, the Government was afforded every opportunity to present its countervailing evidence. The Government carried on extensive discovery by means of interrogatories, depositions, demands for production of documents and its extensive review of defendant's records and files (App. 1-5). Moreover, appellant makes no specific objection to the findings, nor does it specify any particular in which the conclusions of law were not supported by the findings.[1]

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[1]Appellant's only objections to the lower court's findings are relegated to footnotes in its brief (App. Br. 7, 8, footnotes 5 and 7). Without reference to the fact that the local district court rules (Rule 3(g)) require that the moving party accompany his motion with proposed findings of fact and conclusions of law, and without reference to the fact that the Government filed no counter proposed findings and conclusions or any motion to correct the findings and conclusions filed by appellee, appellant complains that the District Court adopted "almost verbatim" appellee's proposed findings.

Appellant's extensive discovery during a two-year period confirmed the fact that Benton's activities were remarkably and intensely local.

Benton was exclusively devoted to rendering services. It rendered no service and it carried on no business outside of Southern California.[2] Benton used local labor exclusively and purchased its supplies in California from California vendors.[3]

Appellant's discovery developed that Benton's communications with those outside of California were astoundingly small. The cost of its interstate telephone calls for the period adopted by appellant as relevant was a mere $19.78.[4] During the year-and-a-half period selected by the Government, the United States mail was burdened by less than 200 letters to and from non-Californians.[5] Consistent and also astounding is the fact that *no* employee or official of Benton made an out-of-state business trip during the period (App. 51). It is almost impossible to conceive of a business organiza-

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[2]Findings 4, 11 (App. 211-212).

[3]Findings 16, 18 (App. 213-214). There were *de minimis* exceptions which appellant concedes were "admittedly small." The total amount thereof was "approximately $140.00" for the period selected by appellant (App. Br. 7, fn. 5). Appellant complains that "the findings do not *reflect* Benton's purchases of out-of-state products from local distributors." See, however, Findings 7, 17 and 18 (App. 212-214).

[4]Finding 15 (App. 213).

[5]That number included both incoming and outgoing communications. Contrary to appellant's statement all were not "mailed" by Benton (App. Br. 7). The "almost 200" included 32 communications to and from governmental bodies such as the Internal Revenue Service, leaving a total of 54 received from non-governmental sources and 117 mailed to non-governmental addressees. All of this shows, as to non-governmental mail, that Benton, during the 78-week period chosen by appellant, sent 117 letters (less than 1½ letters per week) to out-of-state addressees, and that 54 letters were written to it from non-Californians during the same period (App. 147-160).

tion (or even a private person) with fewer out-of-state contacts.

Faced with that convincing record, appellant wisely concluded that it could not comfortably anticipate being able to prove that Benton had been "engaged also in commerce" unless that phrase could be given a new meaning. The result was appellant's contention that a corporation is "engaged in commerce" if it is engaged in "local activities that substantially affect interstate commerce" (App. Br. 36). For that purpose appellant admits that it is required to depart from the "explicit language principle of construction" (App. Br. 34).

Notwithstanding the explicit requirement in Section 7 that the acquired corporation must be "engaged also in commerce," there is no allegation in the complaint that Benton was so engaged.[6] Being unable, or unwilling, to allege that statutory requirement appellant retreated to the position of alleging that Benton's vendors and customers were engaged in commerce:

> ". . . Both ABMI and Benton have purchased and received substantial quantities of janitorial supplies that *have been* shipped and transported across state lines and in interstate commerce. Janitorial service *customers* of ABMI and Benton have regularly engaged in commerce among the several states of the United States." (Complaint, Paragraph 8, App. 8.)[7]

Significantly, in the light of appellant's reliance here upon the assertion that Benton engaged in "local activities that substantially affect interstate commerce," there is no allegation in the complaint that Benton

[6]Finding 19 (App. 214).

[7]Emphasis herein is appellee's unless otherwise noted.

ever engaged in "activities that substantially affect interstate commerce," and of course there is no allegation as to what that "affect" might be.[8]

While there is nothing to show that appellant recognized any obligation to *allege* the "affect" on interstate commerce which it now asserts, there is recognition in its brief that it had the obligation to *prove* that Benton's activities had such an "affect." Appellant asserts that "the record establishes that the Benton companies' activities *affected* an appreciable part of interstate commerce" (App. Br. 37). However, there has been in fact no such showing. All that is shown is that Benton performed services in Southern California on property owned or leased by interstate operators and was paid for those services, and that Benton purchased in Southern California goods which had been brought into Southern California by Benton's vendors prior to the purchase. This is insufficient.

It is, of course, conceded that this appeal relates only to Benton's activities prior to its acquisition by appellee.[9]

[8]Not only is there a failure to allege what, if any, effect the operations of Benton prior to the acquisition had on interstate commerce, but there is a total failure to allege that the acquisition itself had any effect outside of California. The complaint merely alleges that the acquisition had its effect only "in Southern California and in the Los Angeles area" (App. 8). When asked in the interrogatories where the acquisition had its effect, appellant responded that "The sections of the country where the aforesaid acquisition and merger may have said effects are Southern California and the Los Angeles area" (App. 26).

[9]The question presented by the Government turns on Benton's pre-acquisition activities (App. Br. 2), and the Government limits its argument to those activities (App. Br. 5-7, 9, 11, 36-44). The express requirement of Section 7 that the acquired corporation "be engaged *also* in commerce" compels consideration

(This footnote is continued on next page)

SUMMARY OF ARGUMENT.

This brief will show that:

1. Benton was not "engaged also in commerce" and that issue was determined against the Government by *Gulf Oil Corp. v. Copp Paving Co.*, 95 S.Ct. 392 (1974). Appellant's argument is based not upon any engagement of Benton in commerce but upon the activities of its customers and vendors in commerce and the contention is no more than the "purely formal 'nexus' to commerce" (95 S.Ct. at 400) argument unsuccessfully urged by Copp. Since Benton's "nexus" is even more tenuous than that urged by Copp, appellant cannot bring its case within the terms of Clayton 7.

2. Even if Clayton 7's "engaged in commerce" phrase could be construed to refer to activities "that substantially affect interstate commerce," appellant's appeal must fail because the allegation and proof of such "affect," required by this Court's decision in *Copp*, are totally lacking.

3. It was necessary and logical that Congress limit the applicaton of Clayton 7 to cases in which both the acquiring corporation and the acquired corporation were "engaged in commerce," and Congress explicitly did so. The Government's attempt to reconstruct Clayton 7 in its image of the Sherman Act is illogical and cannot withstand analysis of the differing purposes; principles, approaches and remedies of the Sherman and Clayton Acts. Without the narrow direction which Congress gave Clayton 7, it would be vague and lacking in standards.

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of its activities apart from the activities of the acquiring corporation and prior to the acquisition (the acquired corporation's activities necessarily cease upon acquisition).

4. Congress, the Federal Trade Commission and the Department of Justice have for 60 years rejected appellant's current interpretation of Section 7. There have been a significant number of occasions on which Congress has rejected broader commerce language with respect to Clayton 7. The FTC has not embraced appellant's interpretation of Clayton 7, and has recognized in connection with Section 5 of the FTC Act that Congressional action was necessary to expand its "in commerce" scope. Even the Department of Justice has, until now, interpreted Clayton 7 contrary to its present contention.

5. There is no support for appellant's contention that "changing economic conditions" require its attempted expansion of Clayton 7. There is no support for, or materiality to, appellant's suggestion that there was uncompetitive growth in the "service sector of the national economy," or that there was a trend towards concentration in that sector, or that any such growth or concentration in the overall "service sector" has any relation to the economic conditions in the janitorial service industry. The janitorial service business is highly competitive, and acquisitions in that business have less effect upon competition than in other types of businesses.

ARGUMENT.

I.

Benton Was Not "Engaged Also in Commerce" and That Issue Was so Determined in Gulf Oil Corp. v. Copp Paving Co.

Notwithstanding the recent determination in Section II of this Court's opinion in *Gulf Oil Corp. v. Copp Paving Co.*, 95 S.Ct. 392, 397-400 (1974), appellant continues to argue that Benton was "engaged also in commerce" within the terms of Clayton 7 (App. Br. 36-44). Appellant's assertion here is first, that because Benton rendered janitorial services in local buildings in some of which there existed interstate facilities owned by interstate operators, Benton, too, was engaged in commerce, and second, that because Benton purchased in Southern California from Southern California vendors some goods which happened to have been manufactured in other states, Benton was engaged in the commerce of its vendors. This is nothing more than the "purely formal 'nexus'" argument unsuccessfully advanced by Copp.

In reality, appellant's argument here has even less factual basis than Copp's. For instance, if an interstate baker with his plant in Los Angeles buys his flour from one who grows the wheat and grinds the flour wholly within California, appellant would be required to concede that the flour seller (like the asphalt seller in *Copp*) was not "engaged in commerce" within Clayton 7, but appellant would apparently nevertheless contend that the janitorial service corporation which contracted to sweep floors in the bakery would be "engaged in commerce." Such a result is obviously not sustainable.

The validity of the Court's determination in *Gulf Oil Corp. v. Copp Paving Co.*, 95 S.Ct. 392 (1974) cannot be disputed but appellant disregards its provisions. Therein the Court said:

> ". . . [T]he distinct 'in commerce' language in the Clayton . . . Act provisions with which we are concerned here appears to denote only persons or activities within the flow of interstate commerce—the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer.
>
> "If this is so, the jurisdictional requirements of these provisions cannot be satisfied merely by showing that allegedly anticompetitive acquisitions and activities *affect* commerce." (95 S.Ct. at 398, emphasis by the Court)

Obviously there is no "flow of interstate commerce" in the intensely local activity of supplying janitorial services to buildings in Southern California, using for that purpose entirely local labor and supplies purchased from vendors in that locality.

Nonetheless, appellant continues to assert that "the Benton companies' activities affected an appreciable part of interstate commerce" (App. Br. 37). Appellant does so without any suggestion or showing as to what that "affect" was.

Admittedly, Benton's operations were limited to the rendition of services and "all of the facilities served by [Benton] were located in Southern California" (App. Br. 5). It is conceded that these services were rendered by using local labor obtained and supplies purchased in Southern California (with the exception of "direct inter-

state purchases which were admittedly small" (App. Br. 7, fn. 5)). Appellant's principal reliance for its attempt to show that Benton was nevertheless "engaged also in commerce" rests upon the fact that some of the buildings cleaned by Benton were occupied by interstate operators as lessees or owners[10] and upon the unsupportable assertion that two janitorial service contracts were negotiated by using interstate communications.

Realizing the insufficiency of asserting that Benton was "engaged in commerce" merely because its customers were so engaged, appellant refers to the fact that some of the rooms cleaned by Benton "required exceptionally high maintenance quality" (App. Br. 6) because they contained electronic or communications equipment operated by companies engaged in interstate commerce. The argument apparently is that because some rooms required a higher degree of cleanliness than other rooms, Benton became "engaged in commerce" when it contracted to clean the "clean

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[10]In this connection, appellant asserts (App. Br. 39-40) that Benton's involvement with its customers was "direct" and "vital," citing cases under the Fair Labor Standards Act and applying concepts developed therein. The applicability of the Fair Labor Standards Act cases, and their "nexus" concept, to the Clayton Act, was rejected in *Copp*, 95 S.Ct. at 399-400. Moreover, the record does not sustain the allegations of a direct and vital relationship. From every managerial, accounting, labor relations, tax, legal and other standpoint, Benton's janitorial services were separated from and not an "integral part" of the business of its customers:

> "When a building owner contracts for the cleaning and maintenance of his property, he need not worry about payrolls, federal, state and local income tax returns, labor relations and the whole range of management supervisory and bookkeeping problems." Appellant's Affidavit of Dr. Philip Neff (App. 134).

Like other suppliers of goods and services Benton suffered its own losses, assumed its own liabilities and realized its own profits.

rooms." This type of logic results in appellant's conclusion that "In these areas, janitorial maintenance was an integral part of production operations" (App. Br. 6). This contention is no more than, and in fact has less validity than, the "purely formal 'nexus' commerce" argument rejected in *Gulf Oil Corp. v. Copp Paving Co.*, 95 S.Ct. 392 (1974). The contention is that the "clean rooms" are instrumentalities of interstate commerce and that any conduct of Benton with respect to those rooms puts Benton "in commerce."

That concept was rejected in *Copp* as follows:

> "Copp's 'in commerce' argument rests essentially on a purely formal 'nexus' to commerce: the highways are instrumentalities of interstate commerce; therefore any conduct of petitioners with respect to an ingredient of a highway is *per se* 'in commerce.' Copp thus would have us expand the concept of the flow of commerce by incorporating categories of activities that are perceptibly connected to its instrumentalities. . . . The chain of connection has no logical end point. The universe of arguably included activities would be broad and its limits nebulous in the extreme." (95 S.Ct. at 400)

Appellant apparently does not contend on this appeal that Benton's purchase of supplies from local suppliers caused Benton to be "engaged in the flow of commerce" (App. Br. 39-44). This it reserves for its attempt to show Benton affected commerce (App. Br. 37-38). This forbearance is entirely proper, since Benton's purchases of supplies could never be a basis for finding that, despite the utterly local character of its janitorial services, it was engaged in the flow of commerce. Otherwise there would be "no logical end point."

Benton's purchases of supplies were incidental to its local janitorial activities, comprising approximately three percent of total amounts paid by customers for janitorial services. Benton had no requirements contracts with its suppliers, and there are no significant economies to be realized through bulk purchases of janitorial supplies.[11]

Appellant's assertion that "some of the [janitorial service] contracts were negotiated with out-of-state owners through the use of interstate communications facilities" (App. Br. 6-7) is not supported by the record, is contrary to fact and is just another "nexus" argument.

There is no support in the record for the assertion that the contracts to which appellant refers, the Tishman Plaza contract and the New York Life Insurance contract, were "negotiated . . . through the use of interstate communications facilities." There is in fact nothing in the record to show how or where these contracts were negotiated.

As to the Tishman contract, the record shows no more than that the New York office of Tishman "supervises and monitors" the nationwide operations of Tishman, and that the Tishman management in New York "is consulted before a major janitorial maintenance contract, such as the contract with Benton, is entered into." This general statement of Tishman's internal policies (App. 72-73) will not support appellant's statement.

As to the New York Life contract, appellant refers only to a list of some 200 interstate letters, sent or received by Benton, during a year and a half period

[11]Finding 17 (App. 213).

selected by appellant, which list contains no more than the date of each communication, its addressor and addressee (App. Br. 147-160). The list includes a number of communications from various Benton people to various New York Life people. However, the record is silent as to the content of these communications, and they accordingly furnish no evidence on any issue before the Court. The letters themselves, along with many other letters and documents, were produced to the Government but it elected not to make the content of any of the 200 part of the record.

With the help of the FBI, appellant's counsel engaged in an intensive examination of Benton's records over a period of several months, and engaged in other extensive discovery by means of interrogatories and depositions. All of the facts concerning the negotiations of Benton's contracts were available to appellant. If there had been any fact which could support appellant's assertion of interstate negotiation of contracts, it would have inserted the fact in the record. The conclusion is clear, therefore, that there was no such interstate negotiation.

Moreover, interstate negotiation is no more than just another "nexus" assertion. The fact is that Benton engaged in no janitorial service business except in Southern California. The mere fact that two of its customers happened to have home offices in New York, where the customer "supervises and monitors" *its* interstate business, or the fact that Benton communicated with such New York office cannot transform Benton's exclusively Southern California operation into an interstate business.

Even under the Sherman Act it is clear that jurisdiction cannot be sustained on the basis of interstate com-

munications conducted in the regular course of an otherwise purely local business. *John Kalin Funeral Home, Inc. v. Fultz,* 313 F.Supp. 435, 438-439 (W.D. Wash. 1970), *aff'd* 442 F.2d 1342 (9th Cir. 1971) *cert. den'd* 404 U.S. 881 (1971).

The mere fact that activities such as interstate boxing promotion and interstate insurance, which carry on their businesses in several states and which depend for their existence on interstate communications, are subject to the Sherman Act where a restraint of trade exists cannot mean that every purely local business which uses interstate communications incidentally is therefore "engaged in commerce" within the Clayton Act. Hence *United States v. International Boxing, Inc.,* 348 U.S. 236 (1955) and *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1944) are not helpful to appellant.

Benton was not "engaged in commerce."

II.

There Is Nothing to Support Appellant's Contention That Benton Was Engaged in "Activities That Substantially Affect Interstate Commerce."

In *Gulf Oil Corp. v. Copp Paving Co.,* 95 S.Ct. 392 (1974), both Copp and the Government in its brief *amicus* sought a "radical expansion of the Clayton Act's scope beyond that which the statutory language defines—expansion, moreover, by judicial decision rather than amendatory legislation" (95 S.Ct. at 402). This contention as now stated in appellant's brief is that "engaged in commerce" means engaged in "local activities that substantially affect interstate commerce" (App. Br. 36). This attempt at "radical expansion of

the Clayton Act's scope" is disposed of in the following Parts III and IV of this brief.

If, however, as we shall now show, Benton's activities had no such "affect" on interstate commerce, affirmance of the judgment here is required, without more. For even if such a "radical expansion" could be allowed:

> "The plaintiff must allege and prove that apparently local acts in fact have *adverse* consequences on interstate markets and the interstate flow of goods in order to invoke federal antitrust prohibitions." (*Copp,* 95 S.Ct. at 395)

Thus, in any event appellant was required to allege and prove that Benton prior to the acquisition engaged in "local activities that substantially affect interstate commerce."

There was no such allegation or proof. The complaint alleged no more than that Benton "purchased and received substantial quantities of janitorial supplies that *have been* shipped and transported across state lines and in interstate commerce," and that janitorial service *customers* of Benton "have regularly engaged in commerce among the several states of the United States." (Complaint, Paragraph 8, App. 8)

The proof went no further.

Appellant's allegations and proof are insufficient to show substantial or any, "affect" on interstate commerce. For instance:

1. There is no intimation, allegation or proof that any activity of Benton restrained or inhibited interstate commerce to any extent or in any degree, substantially or insignificantly.

2. There is no allegation and, except for the broadest generalities, there is no proof of the character or extent of the interstate trade of Benton's customers; there is no allegation or proof of the competitive market in which any such customer was engaged or of the market shares or of any other marketing factors pertaining to the market in which any such customer operated; there is no allegation or proof that Benton's activities for any customer had any substantial, or other, effect upon interstate commerce in the products or services of such customers.

3. There has been no effort or inclination to allege or prove that any vendor of any product to Benton made any sales to any vendee outside of California, or that such vendor was in any way engaged in the interstate sale of such products, and of course there was no suggestion of the extent of those sales.

4. There has been no attempt to allege or prove as to any product purchased by Benton the amount or volume of the interstate sales thereof, the extent, volume or market shares of the vendor of that product or any of the other market factors pertinent and necessary to show the "affect" any purchase by Benton in California may have had upon the interstate commerce in that product.

5. There has been a failure to allege and prove the dollar amount or volume, or any of the other market factors pertaining to any individual product purchased by Benton or the effect, if any, which Benton's purchase of that product may have had on the interstate trade in that product.

6. There has been no endeavor to allege or prove as to any Benton customer the relationship if any

between its janitorial service contracts with Benton and its janitorial service contracts with other contractors either in California or in other states.

7. There has been no endeavor to allege or prove as to any Benton customer any of the market factors which would be pertinent to a showing that Benton's activities for that customer were "local activities that substantially affect interstate commerce" in the janitorial service business.

8. There has been no effort to allege or prove that any interstate communication to or from Benton had any effect on interstate commerce in any product or service.

Apparently appellant has had no realization of the elements necessary to prove a substantial effect on interstate commerce. Instead, appellant is satisfied to rely only upon the "*affect*" *on Benton*. Thus appellant is satisfied to say that Benton's activities affected an appreciable part of interstate commerce because Benton received "80 to 90 percent of *its* revenues" from customers engaged in interstate commerce (App. Br. 37). Again appellant is satisfied to assert a substantial effect on interstate commerce merely from the fact that Benton "paid more than $150,000 per year" to local vendors for goods manufactured in other states (App. Br. 38). It is obviously illogical and insufficient to argue that interstate commerce was substantially affected by merely asserting that Benton was substantially affected.

Accordingly, as stated by this Court in *Copp*, " 'the effects on commerce' theory, even if legally correct, must fail for want of proof." (95 S.Ct. at 403)

III.

It Was Necessary and Logical That Congress Limit the Application of Clayton 7 and It Explicitly Did So.

A. The Limitation of Clayton 7 Was Logical and Necessary.

For the purpose of resolving the issue in this case, it is less than helpful to say that Clayton 7 was intended to complement or supplement the Sherman Act.[12] While it is true that the single word "commerce" needs the same definition in Sherman 1 and Clayton 7, the requirement here is the recognition of the distinction between the "restraint of trade or commerce" of Sherman 1 and "engaged in commerce" of Clayton 7. One may become a part of a conspiracy "in restraint of trade or commerce" and be subject to Sherman 1 even though he is not "engaged in commerce," and one may "engage in commerce" and be subject to Clayton 7 without being accused of being "in restraint of trade or commerce." Accordingly, it cannot be concluded that the reach of Sherman 1 and Clayton 7 are the same merely because each uses the word "commerce."

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[12]Because the two Acts share the common policy of promoting competition, *Transamerica Corp. v. Board of Governors,* 206 F.2d 163, 165 (3d Cir. 1953), stated that the Clayton Act "supplements" the Sherman Act. It would be illogical to argue that the shared policy of the two statutes requires they have identical intrastate reach, and *Transamerica* did not so hold. In *Transamerica* it was admitted that acquired and acquiring corporations were "engaged in interstate commerce" and therefore "within the purview of Section 7." Defendant argued that the acquisition should nonetheless be *exempt* from Clayton 7 because "Congress has not in the past regulated the banking business by legislation directed to corporations generally but rather by special banking legislation. . . ." The Court held, to the contrary, that banking is subject to Section 7. The Government wrongly characterizes that case as an "opinion which has addressed the question presented in this case" (App. Br. 25, fn. 11).

Proper analysis requires recognition that the two Acts have different purposes, principles, approaches and remedies. The Sherman Act is punitive and prohibitory. Its thrust is against actual, existing, visible and provable "restraints" upon commerce. It criminally punishes activities which have already restrained commerce, or civilly prohibits the continuance of existing restraints.

By contrast, Clayton 7 is designed to arrest certain activities "in their incipiency and before consummation. . . ." (S. Rep. No. 698, 63d Cong. 2d Sess. 1). It was enacted to provide preventive medicine not conceptually available under the Sherman Act. Unlike the Sherman Act under which the Government reacts to existing accomplished restraints, Clayton 7 may be invoked against a proposed acquisition, or against one that has been just accomplished if its future effect "*may be* substantially to lessen competition, or tend to create a monopoly." It may even be invoked against a very old acquisition whenever it "threatens to ripen into a prohibited effect."[13] Because relief under Clayton 7 is founded upon the reasonable probability of future restraints, economic theory is the important part of the resolution of Clayton 7 controversy, and must necessarily be based upon prophecy and opinion as to what the prospective future effect of an acquisition will be.

By contrast, much of the scope of the Sherman Act is covered by the *per se* concept, the use of which

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[13]*United States v. ITT, Continental Baking Co.,* 43 U.S.L.W. 4266, 4272 (U.S. Feb. 18, 1975); *United States v. DuPont,* 353 U.S. 586, 597 (1957).

eliminates any consideration of any economic theory as justification for the alleged *per se* violation. Even where "the rule of reason" is applicable, the emphasis is upon the factual restraint upon competition rather than upon any "reasonable probability" of a lessening of competition in the future.

Thus the Sherman Act is "broad" in its encompassing "every contract, combination . . . or conspiracy," but is "narrow" in its being limited to addressing conduct which *is* a "restraint of trade or commerce," and is "narrow" in the fact that it does not have facility to reach conduct which has a future "reasonable probability of adverse effect on competition." Clayton 7 is "broad" in its permitting a judicial determination of the future probabilities of a corporate acquisition, and in that under Clayton 7 the court is not nearly as inhibited by the facts as it is in dealing with the Sherman Act. However, Clayton 7 is "narrow" in its jurisdictional limitation to acquisitions made by one "corporation engaged in commerce" of the stock or assets of another "corporation engaged also in commerce." The structure of Clayton 7 is like Clayton 3. As Mr. Justice Frankfurter said of Clayton 3:

> "We are faced, not with a broadly phrased expression of general policy, but merely a broadly phrased qualification of an otherwise narrowly directed statutory provision." *Standard Oil Company of California v. United States,* 337 U.S. 293, 312 (1949)

As with Section 3, Clayton 7 has its broadly phrased qualification ("where . . . the effect of any such acquisition may be substantially to lessen competition, or tend to create a monopoly") of an otherwise

narrowly directed statutory provision ("no corporation engaged in commerce shall acquire . . . the stock . . . or . . . assets of another corporation engaged also in commerce"). It is this "narrowly directed provision" which appellant here seeks to avoid.

Appellant's contention is that each of the two "narrowly directed" provisions of Clayton 7 ("engaged in commerce" and "engaged also in commerce") means and includes "local activities that substantially affect interstate commerce" (App. Br. 36). Instead of being "a broadly phrased qualification of an otherwise narrowly directed statutory provision," Clayton 7 would become a statute without limitation as to the actors it would reach (because every business could "affect" interstate commerce in one way or other), and without any guideline as to the future except the vague concept embodied in the words "*may be* substantially to lessen competition."

Congress has customarily been unwilling to enact statutes granting that kind of unlimited power. At least Congress did not do so when it enacted Clayton 7. Since Clayton 7 was to deal with what "may be" the effect of an acquisition, it was normal, reasonable and proper for Congress to impose at least some factual restraint upon the jurisdictional scope of the executive and judicial power. In the case of Clayton 7, Congress explicitly provided a restrictive factual foundation which was required to be shown before the court could indulge in its determination of the reasonable probabilities.

Appellant would have this Court disregard the "narrowly directed statutory provision" of Clayton 7 and make its thrust the same as the Sherman Act under

which "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States v. Women's Sportswear Manufacturers Association,* 336 U.S. 460, 464 (1949)

If one like Benton engaging in such an intensely local activity is to be deemed "engaged in commerce" it would be impossible to conceive of a corporate entity which would not be subject to the vague sanctions of Clayton 7 and the Congressional language would be nullified.

Moreover, if the intention is to newly construe Section 7 to require plaintiff to prove that both the acquired and the acquiring corporations be engaged in activities that "substantially affect interstate commerce," as under the Sherman Act (which seems to be appellant's contention when it says "we submit that Section 7 of the Clayton Act, *like the Sherman Act,* applies to intrastate activities that substantially affect interstate commerce"[14]) the result would be to require preliminary proof "like the Sherman Act" in each case under Clayton 7 before any lessening of competition could be reached.

Significantly, Clayton 7 is the only antitrust legislation the vagueness of which required the documentation by the Department of Justice of "Guidelines."[15] Even when the guidelines were issued, the Department of Justice was careful to say therein that they could not be taken as "conclusive," and that Justice Department activity might "necessarily be based upon a more complex and inclusive evaluation," and that the Department "seeks primarily to prevent mergers which change

[14]App. Br. 36-37.

[15]1 CCH Trade Reg. Rep. ¶ 4510.

market structure in a direction *likely to create* a power to behave non-competitively in the production and sale of any particular product."

It was natural, logical and proper for Congress to limit the application of Clayton 7 to situations in which both corporations were "engaged in commerce."

B. Clayton 7 Is Clear and Explicit.

Both as enacted in 1914 and as reenacted in 1950, Congress applied the prohibitions of Section 7 to corporations only. No acquisition by a natural person, regardless of the extent of his operations, and regardless of the extent and effect of his acquisitions, is, or has been, subject to its prohibitions. Similarly no acquisition even by a corporation of a business of an individual or of a partnership or of an unincorporated business association can violate Section 7, regardless of the extent of interstate activity involved or the anticompetitive effect.

When initially enacted in 1914, Section 7 did not purport to "exercise the full extent" of Congressional power since it applied only to the acquisition of stock. No acquisition of assets, no matter how large, and regardless of the extent or the effect of the acquisition, was then subject to its prohibitions. In 1950, when the provisions of Section 7 were extended to cover the acquisition of assets, the limitation of its application only to corporations was continued.

Moreover in the enactment of Section 7 in 1914, and its reenactment in 1950, Congress explicitly provided that it applied only to a corporation "engaged in commerce" whose transaction was with another corporation "engaged also in commerce." No matter how

extensive the operations of one party to the transaction, it is clear that Section 7 cannot apply unless both parties to the transaction were so "engaged."

Under the Government's premise here, Congress had the power to regulate any such acquisition regardless of the activities of the person or entity on the other side of the transaction. But Congress did not do so.

Moreover, Congress did not do so either in 1914 or in 1950 notwithstanding the fact that at both times it had before it, as a model if it intended to utilize its full power, the all inclusive provisions of the Sherman Act, which in Section 1 was explicitly made to cover "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. . . ."[16] And in Section 2 it was explicitly made to cover "Every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States. . . ."[17] The election of Congress not to follow the all inclusive kind of language found in the earlier Sherman Act demonstrates that Congress did not in Section 7 of the Clayton Act exercise, or intend to exercise, "the full extent of its constitutional power to regulate commerce." Accordingly, cases defining the scope of the Sherman Act, which the Government cites, are not helpful to any determination of the scope of Section 7 of the Clayton Act.

The Government's argument disregards the fact that Section 7 has not one but three prerequisites to its application:

> *First*, the acquiring corporation must be "engaged in commerce";

[16]Sherman Act, §1 (15 U.S.C. §1).

[17]Sherman Act, §2 (15 U.S.C. §2).

> *Second*, the acquired corporation must be "engaged also in commerce"; and
>
> *Third*, the effect of such acquisition "may be substantially to lessen competition, or to tend to create a monopoly."

By contrast, Sections 1 and 2 of the Sherman Act have only the single standard of application, *viz.*, the anti-competitive effect on commerce of the defendant's conduct. The Government would have this Court disregard the fact that in Section 7 Congress, separately and apart from its definition of the parties made subject to its prohibition, defined the action by those parties which was prohibited. No one has contemplated that any but a small percentage of corporate acquisitions would be subject to Section 7. For instance there were 3,158 mergers recorded in 1972 and 2,836 mergers recorded in 1973, only a few of which were challenged by the Department of Justice or the Federal Trade Commission.[18]

Section 7 is not the only Clayton Act section which on its face is narrowly directed in numerous respects.[19] As with Section 7, multiple additional limitations appear on the face of the other Clayton Sections.[20] The

[18]Federal Trade Commission News Release of November 1, 1974.

[19]Clayton 7 does not apply even to corporations, if they purchase the stock of another corporation engaged also in commerce "solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition." Nor will a corporation engaged in commerce violate the Section if it causes "the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition."

[20]Clayton Section 2(a), as amended by the Robinson-Patman Act (15 U.S.C. §13(a)) applies to "any person *engaged in com-*

(This footnote is continued on next page)

courts, in applying Clayton 7's companion sections, have given them restricted interpretation consistent with their narrow language and scope. Thus this Court concluded in its *Copp* opinion, that the facially narrow language of Section 2(a) and its legislative history compelled restrictive interpretation (95 S.Ct. at 401). Similarly, the cases interpreting Clayton 3 have given it limited sweep. We have seen no case in which a court has ever applied that section to a person not involved in the flow of interstate commerce.[21]

As will be shown hereinafter, Congress throughout the 60-year history of Clayton 7 has maintained the "narrowly directed" character of the statute against all efforts to change its character.

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merce, in the course of such commerce" and Clayton Section 3 (15 U.S.C. §14) applies to "any person *engaged in commerce, in the course of such commerce.*" Further, Section 2(a) and Section 3 have application only to "commodities." *Baum v. Investors Diversified Services, Inc.*, 409 F.2d 872, 875 (7th Cir. 1969).

Clayton Section 8 (15 U.S.C. §19) pertaining to corporate interlocking directorships applies to only a limited area of interlocks. Thus even between two direct competitors there is no prohibition against an officer of one (but not a director) being a director of the other, because the Act applies only to the situation in which the person is a director of both. And Section 8 does not cover vertical interlocks (between a seller and a buyer) which could be anticompetitive.

Recognizing its limitations the Justice Department now seeks to broaden Section 8 by Amendment. Antitrust & Trade Reg. Rep., No. 695, p. A-1 (Jan. 7, 1975).

[21]The defendants in *Standard Fashions Co. v. Magrane-Houston Co.*, 258 U.S. 346, 351-352 (1922) (cited in appellant's brief *amicus curiae* in *Copp*) and the defendants in *Standard Oil Co. v. U.S.*, 337 U.S. 293, 295 (1949) (cited by this Court in *Copp*, 95 S.Ct. at 402, fn. 18) transacted business across state lines and were thus clearly "engaged in commerce" as required by Clayton Section 3.

IV.

For 60 Years Congress, the FTC and the Department of Justice Have Rejected Appellant's Current Interpretation of Section 7.

A. Throughout the History of the Clayton Act, Proposals to Congress to Incorporate the "Effect on Commerce" Concept Have Been Rejected.

We have shown that Congress logically and explicitly limited the application of Clayton 7 to corporations "engaged in commerce." Notwithstanding this foundational fact, there have been from time to time efforts to inject into Section 7 and other portions of the Clayton Act the "effects on commerce" concept which the appellant here urges. These proposals have been uniformly and properly rejected.

The Government persists in urging (App. Br. 24-25) that Congress simply did not consider the meaning of the words "engaged also in commerce" in enacting Clayton 7 in 1914, or in amending it in 1950, or at any other time from 1914 to present. This is not only an unflattering view of Congressional draftsmanship, it is contrary to the facts in the legislative record.

The Government refers to the fact that Congress considered and rejected a version of Section 2(a) of the Robinson-Patman Act which would have made it applicable to discriminatory sales by "any person, ***whether in commerce or not***." Appellant states, "There is no comparable evidence of a conscious Congressional decision to reject arguably broader commerce language with respect to Section 7" (App. Br. 24). However, the legislative history of Section 7 reveals not only "comparable" but *better* evidence of a conscious decision to reject broader commerce language.

Following its enactment Clayton 7 was almost constantly before Congress. The first bill to amend Section 7 was propounded to the Senate in 1921.[22] The 1914 version of Section 7 did not bar the acquisition of assets and this Court so construed the statute in 1926,[23] and again in 1934.[24] This deficiency or "loophole"[25] was the principal impetus for the intense legislative re-examination of Clayton 7 which took place in the years from 1937 to 1950. During that period at least 19 bills to amend Section 7 were propounded in Congress.[26] Three separate sessions of full public hearings were held on various of the proposed amending bills.[27]

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[22]S.277, 67th Cong., 1st Sess. (1921).

[23]*Federal Trade Commission v. Western Meat Co.*, 272 U.S. 554, 563 (1926).

[24]*Arrow-Hart & Hegeman Electric Co. v. Federal Trade Commission*, 291 U.S. 587, 599 (1934).

[25]"Although proponents of the 1950 amendments to the Act suggested that the terminology [omitting coverage of asset acquisitions] employed . . . [in the 1914 version of Section 7] was the result of accident or an unawareness that the acquisition of assets could be as inimical to competition as stock acquisition, a review of the legislative history of the original Clayton Act fails to support such views. The possibility of asset acquisition was discussed, but was not considered important to an Act than conceived to be directed primarily at the development of holding companies and at the secret acquisition of competitors through the purchase of all or parts of such competitors' stock." *Brown Shoe Co. v. United States*, 370 U.S. 294, 313-314 (1962).

[26]H.R. 7371, S.2549, 75th Cong., 1st Sess. (1937); H.R. 10176, S.3345, 75th Cong., 2d Sess. (1938); S.577, H.R. 1517, 78th Cong., 1st Sess. (1943); S.615, H.R. 2357, H.R. 4519, 79th Cong., 1st Sess. (1945); H.R. 4810, H.R. 5535, 79th Cong., 2d Sess. (1946); S.104, H.R. 515, H.R. 3736, 80th Cong., 1st Sess. (1947); H.R. 7024, 80th Cong., 2d Sess. (1948); S.56, H.R. 988, H.R. 1240, H.R. 2006, H.R. 2734, 81st Cong., 1st Sess. (1949). Annually from 1927 to 1950 the Federal Trade Commission recommended amendment to §7. *Section 7 Of The Clayton Act: A Legislative History*, 52 Colum. L. Rev. 766, 766-767 (1952).

[27]Public hearings were held on H.R. 2357, 79th Cong., 1st Sess. (1945); S.104, 80th Cong., 1st Sess. (1947); H.R. 515, 80th Cong., 1st Sess. (1947); H.R. 988, H.R. 1240, H.R. 2006, and H.R. 2734, 81st Cong., 1st Sess. (1949-1950). (See *Brown Shoe Co. v. United States*, 370 U.S. 294, 312, fn. 19; and see *Hearings Before Subcommittee No. 3 of the Committee on the Judiciary of the House of Representatives on H.R. 988, H.R. 1240, H.R. 2006, and H.R. 2734, Wednesday, May 18, 1949).*

It is little short of preposterous to say, as does appellant, that Congress never consciously considered the significance of the words "engaged also in commerce" (App. Br. 24-25). One would assume that careful legislators would be concerned with the significance of each word in the statute they were drafting, more particularly where the language delineated the jurisdiction, the very power of the courts to act under the statute.

But one need not make assumptions. No less than six of the bills considered from 1943 to 1950[28] (three of which were considered in the three separate sets of public hearings[29]) proposed to add to Section 7 the following language requiring premerger review and approval by the FTC, and importing into the statute a much broader jurisdictional test reaching activities "affecting commerce":

> "Wherever the consummation of any plan, undertaking or agreement by or on behalf of any corporation *engaged in or affecting commerce or engaged in manufacturing or processing for distribution in commerce* or by or on behalf of any of its subsidiaries so engaged, to acquire the whole or any part of the stock or other share capital or the whole or any part of the assets other than inventories of any other corporation likewise engaged would involve property to the value of more

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[28]S.577, H.R. 1517, 78th Cong., 1st Sess. (1943); S.615, H.R. 2357, 79th Cong., 1st Sess. (1945); S.104, 80th Cong., 1st Sess. (1947); H.R. 1240, 81st Cong., 1st Sess. (1949).

[29]H.R. 2357, 79th Cong., 1st Sess. (1945); S.104, 80th Cong., 1st Sess. (1947); H.R. 1240, 81st Cong., 1st Sess. (1949).

> than $....., no such plan, undertaking, or agreement by or on behalf of any corporation subject to the jurisdiction of the Federal Trade Commission under sections 7 and 11 of the Clayton Act, as amended, shall be consummated, effectuated, and completed except upon and after compliance with the following requirements: . . ."[30]

These proposed amendments to Clayton 7 were rejected after public hearings.

Thus, during the seven years prior to the 1950 amendments to Section 7, in both House and Senate bills considered in public hearings, proponents of amendments sought to engraft onto Section 7 precisely that "affecting commerce" language which the Government contends Congress never consciously considered. Sponsors of this proposed broadening language included Representative Kefauver (H.R. 2357, 79th Cong.) and Senator O'Mahoney (S.577, 78th Cong.; S.615, 79th Cong.; S.104, 80th Cong.), leaders of the move to amend Section 7. These men must have recognized that Clayton 7's "engaged in commerce" language reached only corporations engaged in the flow of commerce. They were doubtless aware of this Court's 1941 decision in *Federal Trade Commission v. Bunte Bros., Inc.*, 312 U.S. 349, narrowly interpreting the words "in commerce" in Section 5 of the Federal Trade Commission Act,[31] enacted concurrently with and

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[30]This is the exact language appearing in each of the bills noted in footnote 28.

[31]Section 5(a)(1) of the FTC Act formerly provided:
"Unfair methods of competition *in commerce* and unfair or deceptive acts or practices *in commerce*, are hereby declared unlawful."
It has since been amended. See footnote 40.

as a complement to the Clayton Act. In *Bunte* this Court said:

> "This case presents the narrow question of what Congress did, not what it could do. And we merely hold that to read 'unfair methods of competition in [interstate] commerce' as though it meant 'unfair methods of competition in any way affecting interstate commerce,' requires, in view of all the relevant considerations, much clearer manifestation of intention than Congress has furnished." (312 U.S. at 355)

In 1950 Congress had before it not only *Bunte Bros., supra,* but Sherman Act cases employing the "affecting commerce" concept.[32] The plainly available "affecting commerce" concept appeared in no less than six bills proposing amendment to Clayton 7, and was rejected, as we have shown.

The framers of the proposed "engaged in or affecting commerce" language in the bills to amend Clayton 7 recognized that the reach of Section 7 could be broadened to embrace corporations whose activities "affected commerce" only by making the statute say so. Moreover, they recognized that the "affecting commerce" language would greatly expand Section 7's reach, and that therefore some limitation upon the operation of the statute was necessary. Accordingly, the proposed review and approval procedures were to be limited to acquisitions in which "property to the value of more than $....." would be involved. No

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[32]For instance, *The Shreveport Rate Cases*, 234 U.S. 342, 356, 358 decided in June of 1914, four months prior to enactment of the Clayton Act; *Apex Hosiery v. Leader*, 310 U.S. 469, 484 (1940); *United States v. Yellow Cab Co.*, 332 U.S. 218, 233 (1947); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 232 (1948).

such dollar restriction was proposed with respect to the first paragraph of Clayton 7 since its sweep was to remain limited to "acquisitions by corporations engaged in commerce" of "corporations engaged also in commerce."

Congress in 1950 reenacted the same limited jurisdictional language it placed in the statute in 1914, despite all of the years of considering amendments to Section 7 which would have changed the "engaged in commerce" requirement, despite extensive public hearings, despite numerous proposed amending bills, and despite the holding in *Bunte Bros., supra.*

But 1950 was not the last occasion on which Congress considered and consciously rejected broadening the commerce language in Section 7. In April of 1958 the Senate Judiciary Committee, Subcommittee on Antitrust and Monopoly, held hearings on two bills which would have, among other things, changed the commerce requirement of Section 7.[33] Each of these bills would have broadened Clayton 7 by making it applicable wherever "*either* the acquiring corporation, *or* the corporation from which such stock, share capital or assets are acquired, is engaged in commerce. . . ."[34] Public hearings were held on these proposals at which men eminently qualified to interpret Section 7's commerce requirements, and the proposed amendments, advanced their views:

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[33]S.198, 85th Cong., 2d Sess. (1958), sponsored by Senators Kefauver and O'Mahoney; S.722, 85th Cong., 2d Sess. (1958), sponsored by Senators Sparkman and Thye.

[34]Texts of these bills appear in *Hearings on Legislation Affecting Sections 7, 11, and 15 of the Clayton Act Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary Pursuant to S.Res. 231 on S.198, S.721, S.722, S.3479,* 85th Cong., 2d Sess. (1958).

"Senator Sparkman.

* * *

"Third, the bill would amend Section 7 of the Clayton Act so as to make the statute applicable to monopolistic mergers where either the acquiring or the acquired corporation is engaged in interstate commerce.

"At present, the antimerger law is, as you know, applicable only where the acquired corporation is engaged in commerce. As a result, *in cases where the acquired corporation is engaged exclusively in intrastate commerce, the enforcement agencies lack jurisdiction to proceed under Section 7,* no matter how seriously anticompetitive the effects of the merger may be."[35]

* * *

"Senator Kefauver. Another provision of your bill S.722 is in connection with whether the corporations are engaged in interstate or intrastate commerce. Is that correct?

"Senator Sparkman. Yes.

"Senator Kefauver. As matters now stand, must both of them be engaged in interstate commerce?

"Senator Sparkman. That is correct. The acquired company must be engaged in interstate commerce—

"Senator Kefauver. The acquired company?

"Senator Sparkman. Yes, and the acquiring.

"Senator Kefauver. Both the acquired company and the acquiring company?

"Senator Sparkman. Yes.

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[35]*Hearings on Legislation Affecting Sections 7, 11 and 15 of the Clayton Act, supra,* (see fn. 34).

"Senator Kefauver. What does your bill do in that connection?

"Senator Sparkman. It makes it applicable if *either* company is engaged in interstate commerce."[36]

* * *

"Senator Kefauver. As the law stands now, both must be.

* * *

"Mr. Dixon.[37] It is that, I will assure you, and the first four or five sentences of Section 7 definitely make that so.

[Here Dixon reads opening portion of Clayton 7.]

"So the requirement is very definitely, today, that they both must be in commerce for the Section 7 to apply.

* * *

"There is some dispute as to the difference between 'in commerce.' *The 'in commerce' test is quite different from 'affecting commerce,' as you recognize.*[38]

Senators Sparkman and Kefauver, and Mr. Dixon all accepted without question that Clayton 7's language requiring the acquired corporation be "engaged also in commerce" meant engaged in the flow of commerce, and that the proposed amendments were necessary to

[36]*Hearings on Legislation Affecting Sections 7, 11 and 15 of the Clayton Act, supra* (See fn. 34) at 24-25).

[37]Paul Rand Dixon, then Counsel and Staff Director to the Sub-Committee on Antitrust and Monopoly, subsequently Chairman of the Federal Trade Commission.

[38]*Hearings on Legislation Affecting Sections 7, 11 and 15 of the Clayton Act, supra* (See fn. 34), at 83-84.

extend Clayton 7's reach to corporations whose local activities merely "affected" commerce. Congress did not enact the proffered bills.

Since 1958 Congress has passed up at least two more distinct opportunities to broaden the commerce language of Section 7. In 1966 it had before it and passed the Bank Merger Act of 1966 without otherwise changing Clayton 7.[39]

The most recent consideration of the statutory "in commerce" phraseology occurred when Congress was asked to, and did in January of this year, amend Section 5 of the FTC Act by changing its phrase "in commerce" to read "in or affecting commerce." Notwithstanding the fact that the FTC Act and the Clayton Act were companion statutes when enacted in 1914, and bear a close relationship to each other, Congress did not embrace the opportunity to make any such change in Clayton 7.[40]

There can be no question but that Congress knew what it was doing when it omitted from Clayton 7 the "affecting commerce" concept in 1914, when such amendments were proposed before and during 1950, when it considered amendments to Clayton 7 in April of 1958, when it had before it the scope of Clayton 7 in 1966 and when it selectively adopted the "affecting commerce" concept in amending Section 5 of the FTC Act this year.

[39]12 U.S.C. §1828(c).

[40]Magnuson-Moss Warranty and Federal Trade Commission Improvement Act §201(a) Pub. L. 93-637, 88 Stat. 2183, 2193, changing §5 of the FTC Act (15 U.S.C. §45) as follows:

"unfair methods of competition [in commerce] *in or affecting commerce* and unfair or deceptive acts or practices [in commerce] *in or affecting commerce*, are hereby declared unlawful."

With this legislative history Congress cannot be held to have intended a result which it so many times declined to enact.

B. The Federal Trade Commission Has Explicitly Rejected the Interpretation Now Urged by Appellant.

Notwithstanding the well known penchant of administrative bodies toward increasing their administrative jurisdiction, the FTC has adhered to the view that Section 7 does not reach local acquisitions. In *In re Foremost Dairies, Inc.*, 60 FTC 944, 1068 (1962), the Commission in an opinion by Chairman Paul Rand Dixon stated that Section 7 "applies only to an acquisition in which both the acquired and the acquiring companies are engaged in commerce." The Commission upheld the hearing examiner's finding that respondent Foremost's acquisition of Florida Dairies Company, a dairy selling exclusively in Florida and purchasing dairy products from a local wholesaler who had previously purchased these items from out-of-state, did not violate Section 7 since Florida Dairies was not engaged in commerce within the meaning of Section 7 (60 FTC at 1090).[41]

Notwithstanding that the FTC and its long-time Chairman, Mr. Dixon, repeatedly affirmed the limited reach of Section 7, the FTC has never sought to amend the section to embrace acquisitions of local businesses. Nor is this because the FTC refrains from lobbying. Indeed it campaigned concertedly for over 20 years for the amendments to Section 7 enacted in 1950.[42]

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[41]The Commission subsequently indicated its continued approval of this position in *In re Ecko Products Co.*, 65 FTC 1163, 1209 (1964) and in *In re Beatrice Foods Company*, 67 FTC 473, 730-731 (1965).

[42]See footnote 26, *supra*.

As we have seen above while the FTC this year found an expansion of its jurisdiction under Section 5 of the FTC Act to be desirable, the FTC did not consider it desirable to similarly seek to change Clayton 7.[43]

C. Appellant's Brief Makes It Clear That the Department of Justice Itself Has Since 1914 Rejected the Interpretation It Now Proposes.

Unlike Congress and the FTC, the Department of Justice does not normally document its refusal to exercise its authority. However, in appellant's brief the "past enforcement pattern" of the Department of Justice is revealed:

> "It is true that previous Section 7 cases have involved both acquiring and acquired firms engaged in the flow of commerce." (App. Br. 36)

While the appellant does not disclose when and the extent to which it rejected Section 7 cases where the acquiring and the acquired corporations were not "engaged in the flow of commerce," it is reasonable to assume that among the thousands of mergers each year there must have been a number of instances in which the filing of a Clayton 7 case was rejected by the Department of Justice because one or the other of the corporations was not "engaged in commerce." That there must have been such occasions is implicit in appellant's statement that its:

> ". . . past enforcement pattern simply reflects the fact that the government has devoted its limited enforcement resources to areas where the need was most pressing." (App. Br. 36)

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[43]Thus, Section 5(a)(1) was changed as follows: "Unfair methods of competition *in or affecting commerce* . . . are hereby

(This footnote is continued on next page)

The "Merger Guidelines" issued by the Department of Justice on May 30, 1968 also demonstrate that the Department of Justice has never before conceived that it had the power to attack a merger except where "both the acquiring and acquired firms [are] engaged in the flow of commerce." Notwithstanding that "The purpose of these Guidelines is to acquaint" the public "with the standards currently being applied by the Department of Justice in determining whether to challenge corporate acquisitions and mergers under Section 7 of the Clayton Act" and notwithstanding the fact that the "Guidelines" discussed all of the other language and elements of Clayton 7, no reference of any kind was made to a possible interpretation which would expand the "engaged in commerce" phrase of Clayton 7.[44] And the "Guidelines" have remained unchanged.

V.

There Is No Support for Appellant's Contention That "Changing Economic Conditions" Require Its Attempted Expansion of Clayton 7.

Appellant has repeatedly asserted, as it must, that this appeal is concerned only with the pre-merger activities of Benton.[45] In so doing, appellant has conceded that there is no issue on this appeal as to the effect of the acquisition or the lack of such effect. Moreover appellee has conceded that ABMI, the acquiring company, is and has been engaged in commerce.

declared unlawful." Any similar amendment to Clayton 7 presents a dilemma. It is one thing to legislate with reference to "*unfair* methods of competition in or affecting commerce," but quite another thing to prescribe "activities affecting commerce" without describing at least in general terms what category of activities are legislatively intended.

[44]1 CCH Trade Reg. Rep. ¶4510.

[45]App. Br. 5-7, 9, 11, 36-43.

Inconsistently, and we believe improperly, appellant has injected into this appeal the activities of ABMI and its acquisition history. Perhaps this is done to lend credence to its assertion that "changing economic conditions" call for a new definition to the statutory terms "engaged in commerce" and "engaged also in commerce." All this, notwithstanding appellant's admission that for all of the sixty years of the existence of Clayton 7:

> "It is true that previous Section 7 cases have involved both acquiring and acquired firms engaged in the flow of commerce." (App. Br. 36)

However, the facts with regard to this defendant and insofar as they relate to its history are not properly stated.

The Government's change of policy with reference to Clayton 7 is said to be occasioned by the "rapid growth of the service sector" (App. Br. 36). In so stating, appellant is conglomerating together in one "sector" all who render services which apparently includes all industry except the parts which provide material commodities. According to appellant's proof, the so-called "service sector" includes:

> ". . . establishments primarily engaged in providing a wide variety of services for individuals, business, and government establishments, and other organizations. Hotels and lodging places; establishments providing personnel, business, repair, and amusement services; health, legal, engineering, and other professional services; educational institutions; membership organizations and other miscellaneous services are included." (App. 128)

The fallacy in using the "service sector" as a basis for drawing conclusions as to the janitorial services industry is apparent. To do so is like drawing a conclusion with regard to the manufacture of shoes by lumping all manufacturing establishments in one sector. Others in the universe of the "service sector" by their nature are dependent for the rendition of their services on skilled personnel or skilled labor. The janitorial service industry by contrast basically relies upon the unskilled labor force.

Appellant's assertion that it must be allowed to expand the meaning of Clayton 7 because of the "rapid growth of the service sector of the national economy," and because of the "trend toward concentration in that sector," which by implication furnishes a "most pressing" need for a new interpretation of Clayton 7 cannot withstand analysis.

In the first place, except for generalized conclusionary statements, there is no support for appellant's assertions (App. Br. 36). In the second place, there is no factual showing from which one may conclude that growth in the all inclusive "service sector" means that there was also such growth in the janitorial service industry, or that the trend towards concentration in the all encompassing "service sector" means that there was also a trend towards concentration in the janitorial service business, or the extent of that concentration. Moreover, there is not the slightest factual showing that growth in the "service sector" or concentration therein has been detrimental to competitive conditions. Much less, is there any such showing within that part of the "service sector" which is included within the janitorial service business.

It is difficult to conceive of an industry in which entry is easier or vigor of competition greater than the janitorial service business.[46] The authority on which appellant relies for its generalized assertion that there is a trend toward concentration in the janitorial service industry is the Urban Business Profile, Building Service Contracting, SIC 7349, U.S. Department of Commerce, Economic Development Administration, Office of Minority Business, April, 1972, EDA-72-59582 (App. 143) which contains a more significant description of the industry as follows:

> "The attractiveness of this [building maintenance] market and its relative ease of entry have caused a high level of competition among building maintenance contractors. Firms obtain business largely on the basis of price competition in bidding, though an established reputation for reliability is also important." (page 1)
>
> * * *
>
> "Contracts are generally for 1 year, with either party entitled to terminate upon 30 days notice." (page 4)
>
> * * *
>
> The customer "may have the option of:
>
> (1) doing his own janitorial and other maintenance work; or
>
> (2) contracting such work to the building services." (page 5)
>
> * * *

[46]Telephone directory "yellow pages" within the Los Angeles area defined by the Government disclose the names of over 1,000 firms within the industry category specified by the Government. See Exhibit "O" to defendant's answers to interrogatories filed June 9, 1971.

"Building services contracting has traditionally been a labor intensive business. The main expense item of any contractor is his payroll. In a sense, the contractor is merely a 'labor broker' who handles personnel problems for the building owner." (page 6)

* * *

"The employees of a building services contractor are, for the most part, unskilled." (page 7)

* * *

"The largest form of competition the building services contractor has to face outside of his own industry is in the form of buildings which do their own in-house maintenance." (page 9)

* * *

"The growing market for the building maintenance services industry does not insure high margin and ease in securing work. However, a great many small contractors in this field assure intensive bidding competition, with the emphasis on shaving prices. Cost of maintenance is a primary determining factor in the choice of a building services contractor, and the building owner will, reputation for quality and reliability being equal, choose the contractor who comes in with the lowest bid for the job required." (page 9)

* * *

"The ease of entry into building services contracting is attested to by the large number of firms beginning operations each year." (page 10)

* * *

"The labor force used by a building services contractor is, for the most part, unskilled. Although the wages are low, recruitment of employees is rarely a problem." (page 17)

Thus, appellant's source for its assertion of changing economic conditions which warrant a new "application" of Clayton 7 demonstrates that there does not exist in the industry any such "most pressing" need for expansion of the statute.

Part of appellant's reliance for proof of "changing economic conditions" is its reference to the *National Kinney Corp.* case (App. 143). The history of that case[47] is hardly consistent with appellant's assertion today of a "most pressing" need for anti-merger action in the janitorial service business. Contrary to appellant's assertion, National Kinney Corp. did not become "one of the two leading firms" in the industry solely "as a result of some 60 acquisitions between 1962 and 1966," but National Kinney is one of the largest in the United States by virtue of the merger between Kinney and National, National already being one of the largest in the industry. The stipulation of the Department of Justice permitted the merger to be consummated.

With regard to that part of the janitorial service business which is appellee's, proof is particularly lacking and inexact. Serving as it does 500 communities in the United States and Canada, appellee is "large" and includes other types of business besides janitorial service business. Appellee, during the 12-year period between

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[47]1966 CCH Trade Cases ¶71,814; *Merger Case Digest, 1971,* 125-DJ, 442-444.

1961 and 1973 made, according to appellant's assertion, 54 acquisitions. The actual facts with regard to appellee's acquisitions are stated in Mr. Rosenberg's affidavit (App. 170-175), and are interesting:

1. If one includes every possible "acquisition" which could be included within that term, there were not 54 but 48. Four of these corporations were acquired in 1961 when the Rosenberg brothers, owning all the stock of the 4 companies and most of the stock of the appellee contributed the stock of the 4 companies to appellee. Another 7 of the so-called "acquisitions" were not in fact acquisitions but were companies established in the first instance by appellee, or which became a part of appellee when it was incorporated. Twenty-two of the so-called acquisitions were not janitorial service companies at all, and were companies whose business was explicitly excluded from the area of this case by appellant's answers to interrogatories (App. 17-18). This leaves 15 acquisitions of janitorial companies over the 12-year period selected by appellant.

2. The facts with regard to the 15 janitorial service companies acquired are significant. In no one of these acquisitions did the tangible assets exceed $33,000.00. In no one of these acquisitions did the purchase price exceed $555,000.00. In 8 of the 15, the purchase price was less than $100,000.00. The acquired companies were located in various cities of the country. Only 5 were in California.

3. The small amount of tangible assets involved in the acquisition of janitorial service companies is occasioned by the fact that the only significant asset of such a company is its right to perform its service contracts. This right is hardly an asset the acquiring of

which could substantially lessen competition, since the contracts are by custom in the trade terminable by the customer at any time on 30-days notice. The acquisition of Benton was no different.

Beyond the 30-day period the acquiring company had no hold upon the customers of Benton which could lessen competition. There was no acquisition here of any manufacturing plant, any sales or distribution outlets, any tangible product line, any patents or scientific know-how, or any location or business situs advantage.[48] In short, this was not an acquisition "where the need was most pressing" for a proceeding under Clayton 7, or where the effect could have been "substantially to lessen competition, or to tend to create a monopoly." The "changing economic conditions" assertion is one which more properly should be addressed to Congress.

Conclusion.

The District Court's summary judgment of dismissal should be affirmed.

DATED: Los Angeles, California, April 3, 1975.

Respectfully submitted,

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[48]Finding 12 (App. 213).